

FEB 10 10 47 AM '97 Federal Communications Commission

DA 97-219

DISPATCH

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 97-47
Table of Allotments,)	RM-8992
FM Broadcast Stations.)	
(Westley, California))	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 31, 1997

Released: February 7, 1997

Comment Date: March 31, 1997

Reply Comment Date: April 15, 1997

By the Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed on behalf of Westley-Grayson Broadcasting Company ("petitioner") requesting the allotment of Channel 238A to Westley, California, as that locality's first local aural transmission service. Petitioner stated an intention to apply for Channel 238A if it is allotted to Westley, as requested.

2. Petitioner advises that Westley (pop. 700),¹ is located east of Interstate 5 and is approximately 10 miles southwest of Modesto, California, an urbanized area as defined by the U.S. Census. In support of the proposal petitioner remarks that as Westley is presently devoid of any local aural service, the public interest would benefit by the requested allotment of Channel 238A to that locality. No further information in support of the proposal is provided.

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the proponent of a channel allotment must demonstrate the place to be a geographically identifiable population grouping. *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982). Although the proponent of the allotment does not need to show that the borders of the locality are precisely delineated, it must show that residents of the locality are commonly regarded as a distinct group. This can be proven by the testimony of local residents or by objective or subjective evidence indicating the existence of a community. *Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *aff'd*, 2 FCC Rcd 7562 (1987). Some examples of objective indications of community status include the existence

¹Population figure was presented by the petitioner, based upon information extracted from the "1997 Rand McNally Atlas."

of political, social, economic, commercial, cultural or religious organizations and services in the community. See *Kenansville, Florida*, 5 FCC Rcd 2663 (Policy & Rules Div. 1990), aff'd 10 FCC Rcd 9831 (1995). As Westley is not listed in the Census, and based upon the petitioner's initial presentation, we cannot determine its community status under the *Beacon Broadcasting* or *Kenansville* test. Therefore, petitioner is requested to provide additional information regarding the attributes of Westley, California, consistent with the above guidelines. Failure to provide the requested information will result in a denial of the proposal.

4. In consideration of the petitioner's desire to provide Westley, California, with its first local aural transmission service, should it ultimately be deemed a community for allotment purposes, we will invite comments on the proposal, as indicated *infra*.

5. Channel 238A can be allotted to Westley, California, in conformity with the minimum distance separation requirements specified in Section 73.207(b)(1) and (3) of the Commission's Rules, provided the transmitter therefor is located at least 8.9 kilometers (5.5 miles) south of the community, utilizing coordinates 37-28-13 and 121-11-14.²

6. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to Westley, California, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Westley, California	--	238A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before March 31, 1997, and reply comments on or before April 15, 1997, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

²The site restriction is required to negate a short spacing to the authorized site of Station KHOP(FM), Channel 236B, Oakdale, California, at coordinates 37-47-34 and 120-31-08, as well as to the licensed site of Station KPIX-FM, Channel 239B, San Francisco, California, at coordinates 37-41-23 and 122-26-12.

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9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIXMM Docket No. 97-47
RM-8992

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments: Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments

should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239), at its headquarters, 1919 M Street, N.W., Washington, D.C.